

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1382

To be argued by
JOHN S. SIFFERT

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1382

UNITED STATES OF AMERICA,

Appellee,

—v.—

FREDERICK J. MONTELBANO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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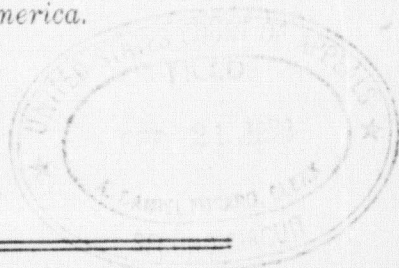


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FREDERICK J. MONTELBANO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frederick J. Montelbano appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on August 4, 1977 following a four-day trial before the Honorable Thomas P. Griesa, United States District Judge, and a jury.

On March 15, 1977 Indictment 77 Cr. 192 was filed, charging Montelbano with various violations of federal laws all arising from Montelbano's participation in the December 7, 1976 hijacking of a truckload of seafood valued at over \$32,000. Count One charged Montelbano and others unknown to the grand jury with conspiracy to steal goods in interstate commerce,* in violation of Title

* The second object of the conspiracy, to dispose of goods stolen from interstate commerce in violation of Title 18, United States Code, Section 2315, was deleted by the Court with the defendant's and the Government's consent, in order to simplify the charge to the jury. (Tr. 269).

18, United States Code, Section 371. Count Two charged Montelbano with obstructing interstate commerce by use of threats, in violation of the Hobbs Act, Title 18, United States Code, Sections 1951 and 2. Count Three charged the substantive crime of theft from interstate commerce, in violation of Title 18, United States Code, Sections 659 and 2.

Trial against Montelbano commenced on August 1, 1977, and concluded on August 4, 1977, when the jury returned a verdict of guilty on all three counts of the Indictment.

On September 7, 1977, Judge Griesa sentenced Montelbano to concurrent terms of five years imprisonment on the three counts of the Indictment. An application for bail pending appeal was denied by the District Court, and this Court affirmed that denial on September 27, 1977. Accordingly, Montelbano is confined to the Manhattan Correctional Center pending this appeal.

Statement of Facts

Government's Case

The Government's case, consisting of testimony of nine witnesses* and twenty-four exhibits, included direct

* Ralph Eme (Tr. 26-109); Joseph Montelbano (Tr. 123-143); Agnes Pollack (Tr. 144-163); Daniel Baron, Police Officer, N.Y.P.D. (Tr. 163-166); George F. Bowe, Sergeant, Freeport P.D. (Tr. 166-178); Fiorentino Fiore (Tr. 178-182); William Watson, Police Officer, Freeport P.D. (Tr. 183-184); William Lonergan (Tr. 205-237, 280-297); Ronald Kosednar, Special Agent, F.B.I. (Tr. 297-345). "Tr." refers to the trial transcript. "Tr." followed by a date, refers to pretrial conferences or other proceedings on the specified date. "App." refers to Appellant's Appendix; "GX" refers to Government's Exhibits; "DX" refers to Defendant's Exhibits; "Br." refers to the brief on appeal of the defendant.

evidence, circumstantial evidence, and similar act evidence, all of which established that Montelbano and two others by use of force and threats hijacked a truck driver, and stole from him his cargo of seafood valued at over \$32,000.

A. The Hijacking

On December 7, 1976, at 5 A.M., Ralph Eme, 19, was dispatched by O.K. Trucking Company of Philadelphia, Pennsylvania to pick up seafood in New Jersey and New York. (Tr. 27-28). After stopping at Far Port Enterprises and Frigid Freezers in Jersey City, (Tr. 28), Eme drove the refrigerated truck to Waldco Enterprises in New York City. At each stop Eme had loaded substantial amounts of seafood onto his truck. (Tr. 29). Following the stop at Waldco, Eme had instructions to complete one final assignment in Manhattan—to stop at Merchant's Cold Storage and assist other O.K. Trucking drivers in taking on possible overflow from their trucks, before returning to Philadelphia. (Tr. 27).

While waiting for a red light at the corner of 10th Avenue and 14th Street, Eme was rushed by a man who grabbed the driver's side door of the truck and pulled it open. Eme unsuccessfully tried to push the assailant off the running board of the cab. The unknown assailant forced his way into the truck and muscled Eme over to the passenger's side of the cab. (Tr. 33). This assailant, identified in the Indictment and at trial as "John Doe", drove the truck around the corner to 14th Street and stopped. Doe ordered Eme to climb over to the driver's side, which Eme did. (Tr. 34). Doe kept his hand in his pocket during this time and Eme, thinking he had a gun, was "scared, very upset." (Tr. 35-36).

In fear of his safety, Eme followed Doe's instructions and drove the truck south on West Street until he arrived

at the waterfront where Doe ordered him to stop. The truck was followed by a red Rambler which also stopped on West Street. (GX 22, 37). The defendant Montelbano and a third male, identified in the Indictment and at trial as "Richard Roe", were in the red Rambler. Once the Rambler and the truck had stopped, Montelbano got out of the Rambler, walked to the passenger side of the truck where Doe sat and instructed Doe to tell Eme that if he didn't do as he was told, his brains would be blown out. (Tr. 37). Although Doe did not repeat these instructions, Eme heard the words clearly. (Tr. 38). After Montelbano returned to the Rambler, Doe instructed Eme to drive the truck to the Fulton Street Fishmarket, where both vehicles again stopped. (Tr. 39).

At the Fishmarket, Montelbano again exited the Rambler. This time he entered the truck on the driver's side, shoving Eme between him and Joe Doe. (Tr. 39). Eme described Montelbano as a man ". . . six foot, one-inch, about 160 pounds, receding hair, thinning on top . . ." (Tr. 39-40) and identified Montelbano in court. (Tr. 40).

Montelbano proceeded to drive the truck out of Manhattan to the Long Island Expressway. Roe followed in the Rambler. They finally left the expressway at Exit 49 and stopped at a gas station. (Tr. 41). During the course of the trip, Montelbano told Eme to remove his glasses and to look straight ahead and if he didn't follow instructions, his brains would be blown out. Montelbano further threatened Eme that it did not make any difference to them whether they blew his brains out because they were going to take the load anyway. (Tr. 41-42). Montelbano exited the truck and made a phone call. After completing his phone call, Montelbano returned to the truck and continued to drive for another fifteen or twenty minutes to the Babylon area of Long Island where the truck and Rambler stopped again. (Tr. 44). There, Montelbano walked behind the truck and

spoke with Richard Roe. After a short time, Montelbano returned to the truck and drove into a shopping center parking lot.

Montelbano instructed Eme to get out of the truck and go with John Doe to the waiting Rambler. Eme and Doe entered the Rambler while Montelbano and Roe took the truck and disposed of the seafood. Forty minutes later, Montelbano and Roe returned with the truck. (Tr. 44-49).

Roe entered the driver's seat of the Rambler and forced Eme to lie face down in the back of the car. (Tr. 49-50). Montelbano drove the truck to the Birchwood Park Shopping Center, followed by the Rambler. At this point, Eme was allowed to sit up. Eme asked Richard Roe to recover his thermos and jacket from the cab of the truck. (Tr. 51). Roe returned with the jacket, but refused to give back the thermos, claiming it might contain fingerprints. (Tr. 57).

The empty truck was abandoned at this second shopping center and Montelbano rejoined Doe, Roe and Eme in the Rambler. Montelbano assumed the driver's seat and drove past an unidentified college near the Long Island Expressway. (Tr. 165; 60). Roe told Eme to give them his driver's license. Roe warned Eme: "that if any of the men were caught, that someone would be down to my address to find me, get me." (Tr. 53; 59).

After driving a short while, Montelbano finally agreed to release Eme close to a telephone. Montelbano instructed Eme "to get out of the car, and walk straight away from the car and don't turn around and look back." (Tr. 60). Eme called the police from a gas station near the Expressway slightly before 3:30 p.m. (Tr. 60; 64). None of the cargo was ever recovered. (Tr. 61).

B. Eme's Eyewitness Identification of Montelbano

Ralph Eme identified Montelbano on two occasions. The first was at a lineup at FBI headquarters in Manhattan on December 16, 1976, nine days after the crime. The second identification occurred in open court. (Tr. 40, 66; GX 7A). At the lineup, Eme stated that Montelbano "looked similar, but I am not certain" that he was a participant. At trial Eme testified that "I believe it is the man sitting at the table." (Tr. 40). Both identifications were admitted. On cross-examination, Eme explained his choice of words at the lineup as follows:

"Q. Would it be correct to say that your state of mind at the time you viewed the lineup was that Mr. Montelbano could have been one of the people involved in the hijacking?

A. No, at the time of the lineup, I believed Mr. Montelbano was the man, but I didn't want to say for sure it was certainly him in a legal sense because I did not have a good view of the lineup.

Q. So, it is your testimony that at the time of the lineup you also believed it was Mr. Montelbano?

A. Yes."

C. Circumstantial Evidence: Montelbano's Use Of The Rambler

The Government established that Montelbano had continued access to the red Rambler used by the hijackers. Eme had made an eyewitness identification of the 1969 red Rambler that followed the hijacked truck throughout the day of the crime, and in which Eme was held hostage while the goods were disposed. Prior to being shown any photographs of the Rambler, Eme described this car in detail for the FBI—including such facts as the mileage

on the odometer, the look of the interior, placement of inspection stickers, the dates they were stamped, wires hanging beneath the dashboard, and the presence of brackets for a radio or 8-track tape player. (Tr. 47). Subsequently, he positively identified several photographs to be pictures of the car used in the hijacking. (GX 9A-P; Tr. 47).

The unequivocal identification of the Rambler was significant because the Rambler belonged to Agnes Pollack, who was Montelbano's admitted girlfriend and the woman with whom he was living. At trial, Pollack identified the car as her own, and further testified that besides herself, Montelbano had free access to the car and was able to use it whenever he wanted. (Tr. 144-46). Montelbano already had admitted to the FBI and grand jury to using the car on December 7, the date of the crime. (Tr. 209, 302). Agnes Pollack's testimony bore this fact out as well. (Tr. 148).

While Montelbano acknowledged using the red Rambler on the day of the hijacking he gave a false exculpatory statement concerning how he used the car. Montelbano had falsely claimed before the grand jury that he had used the car to get work at the Fulton Fish Market the morning of December 7, that at about one o'clock in the afternoon he had gone to a bar for a half-hour in the vicinity of 14th Street and 10th Avenue, and that he had visited his ailing mother in Brooklyn from two o'clock until dinner time. However, before the grand jury, Montelbano was unable to identify a single person he met at the Fishmarket or the name of the bar he

visited.* (GX 18 **). Moreover, the trial jury heard the testimony of Montelbano's father to the effect that on December 7, from ten o'clock in the morning until about four o'clock in the afternoon he and the defendant's mother had been away from their house during which time they did not see the defendant. (Tr. 127-130). Thus Montelbano's use of Agnes Pollack's Rambler at the time of the hijacking was established, and his alibi was thoroughly discredited.

D. Similar Act: Fiore Brothers Theft

The Government was permitted to prove a similar act in order to establish Montelbano's identity as one of the participants in the December 7, 1976 hijacking.

On September 29, 1976, less than three months before the December 7 incident, Montelbano had been caught red-handed stealing seafood from Fiore Brothers in Nassau County. (Tr. 166-84). These State charges were pending at the time of trial.

In the Fiore Brothers incident, Montelbano had employed the same *modus operandi* as during the December 7th hijacking. Montelbano again had two accomplices; they stole a large quantity of seafood—a commodity difficult to dispose of in that bulk; and he drove another of Agnes Pollack's cars—a 1967 Oldsmobile. (Tr. 166-84, 147; GX 11B, 12A-C).

* Monteibano's earlier statement to the FBI did not include any reference to going to a bar or visiting his parents, omissions which provided further evidence of the falsity of his grand jury testimony. (Tr. 211-12; 302-03).

** GX 18 was a redacted version of Montelbano's grand jury testimony which deleted his assertions of the Fifth Amendment to various questions.

E. The Defense Case

The defendant did not testify and called no witnesses.

ARGUMENT

POINT I

The District Court Properly Instructed the Jury Regarding Eme's Eyewitness Identification.

Montelbano contends that the District Court committed reversible error in failing to instruct the jury specifically on the fallibility and dangers of eyewitness identification (Br. 13-14). Since the law in this Circuit does not require the District Court to give a specific charge on eyewitness identification, Judge Griesa did not err in failing to give the instruction requested by Montelbano.

Recently in *United States v. Marchand*, 564 F.2d 983, 997 (2d Cir. 1977), this Court reiterated the rule that a cautionary instruction regarding eyewitness identification is not mandatory. In *Marchand* despite the defendant's request for a jury instruction on the dangers inherent in eyewitness identification, the District Court had refused to give such an instruction. In an opinion by Judge Friendly this Court held that the special eyewitness instruction is not mandatory, citing to a number of other cases which have refused to require that such a cautionary instruction be given. See also *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir.) *cert. denied*, 426 U.S. 936 (1976); *United States v. Evans*, 484 F.2d 1178, 1187-88 (2d Cir. 1973). Moreover, in language directly applicable to the instant case Judge Friendly further observed:

"This would be an exceedingly inappropriate case for seeking to make new law on this subject. The identifications that Marchand was the supplier, had a less important part than counsel would have us

believe, and the circumstances were such that a cautionary instruction might have led the jury away from the truth rather than toward it."

See also *United States v. Masterson*, 529 F.2d 30 (9th Cir. 1976).

As in *United States v. Marchand*, *supra*, the evidence against Montelbano was not limited to eyewitness identification. The Government's proof consisted of false exculpatory statements relating to where Montelbano had been on the afternoon of the hijacking, and similar act evidence. The most damaging proof was not the victim's eyewitness identification. Rather the most incriminating evidence related to Montelbano's use of and access to the car used by the hijackers. The defendant's girlfriend testified that she owned the red Rambler used by the hijackers and that Montelbano had free access to that car. Montelbano had admitted to the grand jury and the FBI that he had used the red Rambler on the afternoon of the hijacking, but he claimed that he had used the car to visit his mother. In view of Montelbano's father's testimony that on December 7, the day of the hijacking, he and the defendant's mother were not at home from ten o'clock in the morning until about four o'clock in the afternoon and that they did not see the defendant, the jury was compelled to conclude that even independent of the victim's eyewitness identification, Montelbano had used the red Rambler to hijack Eme's truck.*

* In denying the motion to set aside the verdict Judge Griesa explicitly found that the Government's case was overwhelming even without Eme's testimony or the similar act:

"Was there any explanation given in the grand jury at a time when he was there trying to say anything he could to exculpate himself, and nothing was said as to how it [the red Rambler] could possibly have been in somebody's hands for several hours while the car was driven around Manhattan and out to Long Island and

[Footnote continued on following page]

In view of this Court's opinion in *United States v. Marchand, supra*, Montelbano's reliance on *United States v. Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972), a case decided prior to this Court's decisions in *United States v. Marchand, supra*, and *United States v. Evans, supra*, is misplaced. In *Marchand* this Court explicitly stated that the language from *Fernandez* relied on by Montelbano was not the basis for the reversal, and did not require the District Court to instruct on the dangers inherent in eyewitness identification. This Court in *Fernandez* was concerned with the District Court's failure to comply with Rule 30, F. R. Crim. P., because the district judge had required counsel to make exceptions to his charge in the jury's presence. The District Court's refusal to give a cautionary charge was a secondary issue in *Fernandez* compounded by an impermissibly suggestive photographic identification.*

back. There is no rational explanation for that. All of that is practically conclusive before you even get to [Mr. Eme].

It just happens that [Eme] at a lineup identified this man though it was somewhat tentative. But it just isn't by coincidence that the identification, even tentative, was of the man whose girlfriend owned the red Rambler and who had the red Rambler on that day.

To talk about weak evidence and all of this is just out of the question." (Tr. 448-49)

* Furthermore, in each case from other circuits cited by the defendant for the proposition that a cautionary instruction must be given, there was virtually no evidence other than eyewitness identification. *United States v. Dodge*, 538 F.2d 770, 783-84 (8th Cir. 1976); *United States v. Hodges*, 515 F.2d 650, 651 (7th Cir. 1975); *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *United States v. Barber*, 442 F.2d 517 (3rd Cir.), cert. denied, 464 U.S. 958 (1971); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir. 1969). Moreover, in each of these cases, appellants, had raised the argument that either the government's evidence was insufficient (*United States v. Barber*;

[Footnote continued on following page]

Thus, Judge Griesa determined that in a case where the Government's evidence was not limited to eyewitness identification there was no reason to mislead the jury by focusing the jury's attention on one particular piece of evidence. (Tr. 276-79). The District Court fully explained that the jury was to decide the weight to be given each piece of evidence (Tr. 412-13), and that they were to decide whether to believe a witness's testimony. (Tr. 321-23). In addition, he provided the jury with general guidelines in determining credibility and he instructed the jury that the Government had to prove beyond a reasonable doubt that Montelbano knowingly participated in the theft. (Tr. 410). These instructions read in their entirety fully protected Montelbano's rights. The District Court was under no additional obligation to instruct on the dangers of eyewitness testimony. Rather, Judge Griesa acted well within his discretion in declining to give a cautionary instruction in light of the corroborating evidence. *United States v. Masterson*, *supra*, 529 F.2d at 32.

POINT II

The District Court Did Not Err In Excluding Certain Hearsay Testimony and Prior Statements By the Eyewitness.

Montelbano contends that in the following three instances Judge Griesa committed reversible error in excluding evidence offered by the defendant: 1) statements by an informant to an FBI agent and contained in police reports; 2) prior statements of a Government witness—Robert Eme—made to the police following the hijacking; and 3) an unsworn transcript of a telephone conversation

Macklin v. United States; *United States v. Telfaire*; *United States v. Dodge*) or that the in-court identification had been preceded by either a misidentification or an impermissibly suggestive show-up. (*United States v. Hodges*, *Macklin v. United States*) None of these claims has been made in the instant case.

between Eme and an Assistant United States Attorney made after Eme testified at trial. In each instance Judge Griesa properly exercised his discretion in excluding the evidence.

A. Hearsay Statements of the Informant

Prior to trial Judge Griesa denied Montelbano's motion to compel the disclosure of an informant's identity. The informant had told both the police and FBI that three hours *before* the hijacking he had seen a red Rambler, bearing the same license numbers as Agnes Pollack's, in the vicinity of 10th Avenue and 14th Street. The informant also described seeing three men in the Rambler, two of whom fit Montelbano's general description. When shown a photograph of the lineup from which the victim Eme had selected Montelbano, the informant could not say that any of the men was or was not an occupant of the Rambler. With respect to a photograph of the defendant, the informant merely said he was not known to him. (Kosednar Aff'd. para 12.)*

Montelbano does not claim that Judge Griesa erred in ruling that the informant's identity should not be dis-

* One male was described as "white, male, 5' 10", medium build", another was described merely as "white, male". The third male was described to be different in appearance than Montelbano. These statements were contained in the affidavit of S.A. Ronald Kosednar, FBI, submitted in opposition to defendant's motion to disclose the informant's identity. In addition, according to the Kosednar affidavit, the informant disavowed an earlier description of the first male which asserted that he had a stooped back. This description had been given earlier to another FBI agent who attributed it to the informant.

The unsealed affidavit, served on counsel, was filed as if under a protective order. Although certain details of that affidavit contain sensitive matters that may tend to disclose the informant's identity, the portions referred to here do not.

closed.* Instead Montelbano claims that he is entitled to a new trial because the District Court refused to permit him to introduce as evidence hearsay statements made by the informant and an unnamed truck driver to New York City policemen and an FBI agent. Since Judge Griesa properly excluded these hearsay statements which would have been offered through a police report and an FBI agent, Montelbano's claim must fail.

Montelbano in effect concedes that the offered evidence is hearsay. He does not contend that the evidence falls within any of the well recognized exceptions to the hearsay rule contained in Rule 803, Fed. R. Evid. Instead he attempted in the District Court, and renews his effort in this Court to avoid the impact of the District Court's ruling that the identity of the informant need not be disclosed by offering the informant's statements through a police report and an agent's testimony under Rule 804(b)(5), Fed. R. Evid.** Even assuming that the

* In view of the Government's compelling showing before the District Court that the informant's testimony was not necessary to a fair determination of the defendant's case and that disclosure would jeopardize his life, any claim that the District Court did err in not ordering disclosure would be to no avail. See *Rovario v. United States*, 353 U.S. 53 (1957); *United States v. Gonzalez*, 555 F.2d 308 (2d Cir. 1977); *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975); *United States v. Hurse*, 453 F.2d 128 (8th Cir. 1971); *United States v. Tucker*, 380 F.2d 206 (2d Cir. 1967); *United States v. Coke*, 339 F.2d 183, 184-85 (2d Cir. 1964); *United States v. Hannah*, 341 F.2d 906, 907 (6th Cir. 1965).

** Rule 804(b)(5) provides, in part, that the following is not hearsay if the defendant is unavailable as a witness:

"A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (a) the statement is offered as evidence of a material fact (b) the statement is more probative on the point for which it is offered from any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . .

informant was unavailable within the meaning of Rule 804 Judge Griesa was correct in refusing to admit this hearsay testimony based on the "unavailability" of the informant; most assuredly this ruling on the exclusion or admission of evidence did not constitute an abuse of discretion. See *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*); *United States v. Guillette*, 547 F.2d 743 (2d Cir. 1974); *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

The proffered evidence simply did not meet the requirements of Rule 804(b)(5). The statements were not evidence of the material fact of the identity of the hijackers; rather, it pertained to the identity of three men in the Rambler three hours before the hijacking. A reading of the hearsay description further reveals that two of the descriptions could have been Montelbano. Nor would the interests of justice have been served by the receipt into evidence of statements of little or no probative value and where the witness had no opportunity to clarify those statements on cross-examination.*

For the first time on appeal Montelbano also claims that the hearsay statements constitute "statements against interest" under Rule 804(b)(3). The statements do not fall within the language of the rule because they do not expose the informant-declarant to civil or criminal liability, nor are they contrary to his pecuniary or proprietary interest. Indeed the statements furthered his

* *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977), relied upon by the defendant, is clearly distinguishable since there the hearsay statements were contemporaneous with the event and highly probative of a material fact. In the instant case, the hearsay statements were made one day after the crime and were deemed by Judge Griesa to have minimal or no probative value. (Tr. 7/28/77 at 18).

pecuniary interest because as a paid informant he received \$200 for the information. (Kosednor Aff'd para 4). Cf. *United States v. White*, 553 F.2d 310 (2d Cir. 1977). Moreover, Montelbano did not cite Rule 804(b)(3) as a ground for the admissibility of the statement, and he should not be allowed to raise this specious claim for the first time on appeal. See *United States v. Gambino*, Dkt. No. 77-1337, slip op. (2d Cir. Nov. 21, 1977); *United States v. Fuentes*, 563 F.2d 527, 531 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 97 S.Ct. 2686 (1977).

B. Eme's Prior Descriptions of Montelbano

The defendant claims that the District Court erroneously precluded extrinsic proof of the victim Eme's initial descriptions to the police of the hijackers and the car used by the hijackers. Judge Griesa's exclusion of this extrinsic proof in a situation where the defendant had not subjected Eme to cross-examination about these prior statements was entirely correct under Rule 613(b), Fed. R. Evid.

During Eme's cross-examination defense counsel did not specifically question Eme about the descriptions of Montelbano which he had previously given to the police and the FBI. Nor did counsel inquire whether the descriptions that appeared in the police reports produced as 3500 material—one of which was signed by Eme (App. Exh. E)—constituted an accurate or complete description of what Eme had told the agents. Instead, counsel in essence asked whether Eme had given the police the "best description he could" and Eme responded that he had. (Tr. 91-92).

The defense attorney sought to elicit Eme's earlier descriptions through the testimony of police officers and

their reports. This offer of proof was made after Eme had testified and at a time when Eme was on a truck route in North Carolina and not readily available.* (Tr. 248). Although this is not set forth with particularity, it appears that counsel wanted to establish that Eme had not initially described Montelbano's receding hairline or chipped tooth nor the details of the Rambler. The police report purported to list Eme's descriptions of the three hijackers. The report did not contain any reference to a hijacker with receding hairline and a chipped tooth. Eme, however, never testified at trial that the hijacker did or did not have a chipped tooth. Judge Griesa did not permit this extrinsic proof of Eme's earlier statements, holding that defendant's failure to inquire of Eme about the prior descriptions was an intentional "tactic" (Tr. 192, 250, 252) and "antic" (Tr. 142) designed to lay a "trap" "with a kind of incomplete general question of Eme." (Tr. 199).

* Montelbano does not attack the propriety of Judge Griesa's denial of a mistrial, nor his refusal to grant a continuance nor his refusal to require that Eme be recalled. The trial court's decision was entirely proper since defense counsel intentionally created the situation by not cross examining Eme on his previous statements. (Tr. 142, 192, 199, 250, 252). Moreover, the decision not to recall Eme was not merely an accommodation to OK Trucking Co., as Montelbano suggests. (Br. 12). Rather, it would have been physically impossible for Eme to return, since his truck route kept him far away from New York until the following week (Tr. 248). In any event, the Court found that the testimony concerning the hair and chipped tooth were simply not that probative and that "there is no good reason to recall Mr. Eme." (Tr. 252-53). See *United States v. Taylor*, 562 F.2d 1345, 1363-64 (2d Cir. 1977).

Since Montelbano did not comply with either Rule 613(b)* or Rule 801(d)(1)**, Fed. R. Evid., he was precluded from offering the prior statements for impeachment or as substantive evidence. Montelbano never afforded Eme the opportunity to explain the prior statement nor did he allow the Government to examine Eme about the prior statements. Accordingly, even if Eme's prior statements to the police in the form of an affidavit or his oral statement to the FBI fell within Rule 801(d)(1)(A) or (d)(1)(C), Montelbano's failure to subject Eme to cross-examination concerning the statement precludes its admission as extrinsic evidence.

The law in this Circuit fully supports Judge Griesa's exclusion of the proffered evidence because of the failure to lay a foundation. Recently in *United States v. DiNapoli*, 557 F.2d 962, 96 (2d Cir. 1977), this Court upheld the refusal to permit a witness's wife to testify as to the witness's bias against appellant, where "the defense which had cross-examined [the witness] for almost a full day had not laid a foundation for the introduction of such evidence by bringing the matter of his alleged hostility toward the appellant to [the witness'] attention." See also *United States v. King*, 560 F.2d 122, 128 n.2 (2d

* Rule 613(b) provides in part:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.

** Rule 801(d)(1) provides in part:

A statement is not hearsay if—

(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or . . . (C) one of identification of a person made after perceiving him.

Cir.), *cert. denied* 46 U.S.L.W. 3293 (Nov. 1, 1977); *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976). Here, too, Montelbano had not directed Eme's attention to the omission in the police reports of any reference to a chipped tooth or receding hairline.*

In this case the possibility that the extrinsic evidence of Eme's statement—the police report—could have been readily explained by the witness when confronted by the report is not remote. The record reveals that Eme actually had told the police about the receding hairline although their reports did not include it. (Tr. 198, 247, 281). Although the proffered report which appears in the Appendix as Exhibit E was signed by Eme, Eme only had dictated the descriptions and the police may not have transcribed Eme's statement verbatim. (Tr. 247). Furthermore, if the report were admitted without confronting the witness, the Government would have been foreclosed from establishing that even if Montelbano's chipped tooth had been shown to Eme at trial, Eme would still have stated that he believed that Montelbano was one of the hijackers.** (Tr. 139-40, 246).

Montelbano seeks to avoid the requirements of Rule 613(b) by arguing that the evidence falls within Rule

* Montelbano's claim that trial counsel asked the witness the foundation questions for admission of prior inconsistent statements as outlined in 3 Weinstein's *Evidence* par. 613[04] p. 613-16 is simply not correct. (Br. 27). He completely failed to follow the statement in the treatise that the witness be asked to "name the time, place, and the person to whom made," and "whether he made the alleged statement, giving its substance."

** Judge Griesa observed Montelbano speaking and found that Montelbano's tooth was "not so different" and "might not be so noticeable." (Tr. 204). In discussing this further, the Court remarked that Defense Exhibit B, a photograph of the tooth that was received in evidence, was "positively misleading" and found that the tooth "is not a deformity, not something that you would necessarily notice or describe if you were under stress." (Tr. 252).

801(d)(1)(A) and (d)(1)(C). This argument is simply besides the point. Rule 801 allows a defendant to avoid any hearsay problems with a prior out of court statement provided the prior statement is inconsistent, under oath and the witness is subject to cross-examination concerning the statement. Rule 801(d)(1) must therefore be read with a gloss from Rule 613(b) which provides the procedure a party must follow in order to offer extrinsic evidence of a prior inconsistent statement. Nothing in Rule 613(b) suggests that its requirements are not fully applicable to a prior statement admissible under Rule 801. Indeed, the predicate of both Rule 801(d)(1)(A) and (d)(1)(C) permits the admission of prior statements only if the declarant is subject to cross-examination concerning the statement. Here trial counsel's tactic of not examining Eme with regard to the prior statement precluded Eme from clarifying the statement and created a substantial risk that, unexplained, the statement would have been unfairly prejudicial and misleading to the jury. *United States v. DiNapoli, supra*, 557 F.2d at 965; *United States v. King, supra*, 560 F.2d at 128 n.2; Rule 403 Fed. R. Evid.

Furthermore, because of defense counsel's failure to confront Eme with the police report we do not know whether it is even an inconsistent statement for purposes of Rule 801(d)(1)(A). The affidavit, Exhibit E of Appendix, contains a brief description of three hijackers. There is no way of knowing without Eme's testimony which description was that of Montelbano as opposed to his two accomplices. The failure of the report to refer to receding hair could be because Eme did not notice this physical attribute or because the police neglected to write that description on the report. There is nothing in the affidavit to suggest that it purports to be a complete description of the hijackers. Moreover, it is hard to comprehend the claim that a police report failing to mention these physical attributes is inconsistent with the trial

testimony since the testimony did not contradict any portion of the statement—Eme never testified that the hijacker had a chipped tooth.

Finally, Montelbano for the first time on appeal argues that the prior descriptions given by Eme constitute an "identification of a person made after perceiving him" within the meaning of Rule 801(d)(1)(C). The purpose of the Rule is to permit introduction of a witness's prior identification of a particular person as the perpetrator of a crime, and not to permit the admission of prior descriptions of the perpetrator. See *United States v. Lewis* Dkt. No. 77-1224, slip op. 451, 454-57 (2d Cir. Nov. 21, 1977) *United States v. Marchand, supra*.^{*} Moreover, Montelbano never argued to the District Court that the police report was admissible on this basis; he never gave the District Judge an opportunity to consider this theory of admissibility, and this shift of position on appeal bars appellate review on this theory. *United States v. Fuentes, supra*, 563 F.2d at 531; *United States v. Braunig, supra*, 553 F.2d at 780.*

C. The Prosecutor's Telephone Conversation With Eme

Montelbano's final argument is that the District Court should have admitted into evidence a telephone conversation between the prosecutor and Eme. On the second day of trial, the Court requested the Government to contact Eme, pose a series of questions on the telephone concerning Montelbano's tooth, and ask if he could return to

^{*} This Court has indicated that extrinsic proof of a prior identification may be precluded if a witness *once asked* is unable to recall the prior identification. *United States v. Jenkins*, 496 F.2d 57, 68-70 (2d Cir.), *cert. denied*, 420 U.S. 926 (1975). Certainly Judge Griesa was correct in holding that the defendant's failure to even cross-examine about Eme's prior description also precluded extrinsic proof of that description.

testify. (Tr. 201-04). That evening the Assistant United States Attorney spoke to Eme on the telephone and transcribed a portion of the conversation.*

On the following day Judge Griesa denied a motion to recall Eme. Finding that the Government "went really beyond the call of duty" in attempting to locate and speak to Eme, the Court concluded that in light of these responses, the relatively unimportant nature of the testimony and counsel's tactical decision not to confront Eme on the stand with these questions, it was not necessary to recall Eme. Judge Griesa said, in part:

"[Y]ou intentionally refrained as a matter of tactics and strategy from asking him the direct, specific questions about what he observed about

* Part of the conversation went as follows:

"Q. Did you see the defendant's mouth?

A. Yes.

Q. Did you notice anything about his mouth?

A. No.

Q. Did you notice whether or not the defendant had straight teeth or cracked teeth or anything unusual?

A. No. I did not notice anything in detail about his teeth.

Q. Did you notice that he did or did not have straight teeth.

A. No, I did not notice his teeth.

Q. Did you notice that he had straight teeth?

A. I did notice in detail.

Q. Did you notice that he had a cracked tooth?

A. No, I didn't.

Q. Did you describe to any of the police officers who interviewed you anything about his teeth?

A. No.

Q. If I were to tell you that he had a cracked tooth, would that affect your belief that he was one of the participants.

A. No." (Tr. 245-46).

Eme further explained that it would be physically impossible for him to return to New York City until the following week. (Tr. 248).

teeth or the mouth but I think you really can't play that kind of game and the witness has gone now . . .

* * *

I observed Mr. Montelbano yesterday . . . His mouth now displayed the appearance of a kind of mouth that we see, not all the time but very, very frequently . . . this is . . . not something that you would necessarily notice or describe if you were under stress. (Tr. 250-53).

On appeal Montelbano does not contend that Judge Griesa erred in refusing to grant a continuance in the middle of a trial in order to secure Eme's presence. Rather he argues that the District Court committed reversible error in refusing to admit the unsworn telephone conversation between the Assistant United States Attorney and Eme. Even if the statements were relevant, the District Court in its discretion can exclude hearsay. In view of Eme's statement to the Assistant United States Attorney that Eme merely did not notice the details of Montelbano's teeth and that his belief that Montelbano was a participant would not have been affected if he were told that Montelbano had a cracked tooth, the significance of the statement is minimal, and its exclusion certainly was not an abuse of "the wide discretion given to trial judge in making evidentiary rulings." *United States v. McGrath*, 558 F.2d 1102, 1107 (2d Cir. 1977). See also *United States v. Robinson*, *supra*, *United States v. Corr*, *supra*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

John S. Siffer being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *21st* day of *February*, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Morton Endman, Esq
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Poley Square
NYC NY 10007

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

21st day of *February* 1978

Gloria Meyer

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979